Was marbled murrelet habitat adequately protected in the Brand Valley?

Complaint Investigation 000242

FPB/IRC/57

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The Investigation

On July 26, 1999, the Board received a request for an administrative review of the determination to approve the South Island Forest District's 1999-2001 Small Business Forest Enterprise Program (SBFEP) forest development plan (FDP) for the Brand operating area, near Barkley Sound on southwestern Vancouver Island. The Sierra Legal Defense Fund made the request on behalf of the Sierra Club of British Columbia. The Board decided it could not request a review. Instead, the Board decided, at the request of the complainant, to investigate the matter as a complaint in July 2000.

The complainant believes it was unreasonable for the district manager to be satisfied that the FDP adequately manages and conserves marbled murrelet. The complainant asserted that the district manager's failure to ensure that the plan adequately manages and conserves marbled murrelet has placed the species in jeopardy.

Background

The marbled murrelet is a small North Pacific seabird that requires coastal old growth trees for nesting. It is a red-listed, or "threatened" species and loss of nesting habitat is thought to be a major contributor to its decline. The Brand Creek watershed provides significant marbled murrelet nesting habitat, and surveys conducted in 1997 and 1998 showed exceptionally high levels of nesting activity.

The Brand operating area is approximately 700 hectares in size, and it is located within the draft Effingham landscape unit. The landscape unit contains about 16,100 hectares of productive forest land. The Brand operating area and the draft Effingham landscape unit are part of the larger Barkley Sound area of southwestern Vancouver Island. According to reports from the Ministry of Water, Land and Air Protection (formerly Ministry of Environment, Lands and Parks), Barkley Sound is known to support a significant proportion of British Columbia's marbled murrelet population.

In October 1998, the South Island Forest District's 1999-2001 SBFEP FDP for the Brand operating area was made available for public and agency review and comment. The FDP proposed 94 hectares of harvesting in 15 cutblocks in the Brand operating area. The Brand Creek watershed is part of the Brand operating area.

Approximately 100,000 cubic metres of timber in the Brand operating area had been contracted to C. Mokko Manufacturing Ltd., under a timber sale licence. By the fall of 1998, the ministry had invested about $350,000 in infrastructure development, including a log dump, bridge, and 1,700 metres of road construction. The timber sale licence was due to expire in October 1999. The district manager had to decide whether the timber could be harvested from the Brand operating area in light of the potential impact on marbled murrelet.

The Ministry of Water, Land and Air Protection's (MWLAP) district habitat officer, acting forest ecosystem specialist, and rare and endangered species biologist objected to the proposed cutblocks, and they provided separate, written comments to the Ministry of Forests. The MWLAP staff believed that the harvest of the blocks would pose a significant risk to marbled murrelet populations through direct loss and fragmentation of habitat. They suggested the watershed would be an excellent wildlife habitat area or old growth management area (OGMA).

On March 5, 1999, MWLAP's regional manager of fish and wildlife and the acting forest ecosystem specialist met with the district manager. As a result of that meeting, four cutblocks in the upper part of the Brand Valley were changed from 'category A proposed' to 'category I', or information status. The district manager considered that the change to 'category I' status would provide an opportunity to evaluate the potential for a wildlife habitat area (WHA) for marbled murrelet in the Brand Creek watershed.

On March 11, 1999, the district manager approved the FDP. Eleven cutblocks totalling 72 hectares in the Brand operating area were approved. On May 25, 1999, the district manager signed a 14-page rationale for her decision.

Ten of the 11 approved cutblocks were harvested in 1999.

Relevant Legislation

Forest Practices Code of British Columbia Act – Section 40. Giving effect to operational plans prepared by district manager.

> 40. (1) The district manager may only give effect to an operational plan or amendment prepared by the district manager if the plan or amendment meets the requirements of this Act, the regulations and the standards.

Issues

1. Did the district manager comply with section 40 of the *Forest Practices Code of British Columbia Act* (the Act) when she approved the forest development plan?

At the time, section 40 of the Act stated that the district manager may only approve an operational plan or amendment prepared by the district manager if the plan or amendment meets the requirements of the Act, the regulations and the standards.

The Board determined that the 1999-2001 SBFEP FDP for the Brand operating area was prepared in accordance with the requirements of the Act and the regulations. The district manager complied with section 40 of the Act when she approved the plan.

2. Was it appropriate for the district manager to be satisfied that the forest development plan would adequately manage and conserve marbled murrelet?

Although section 40 only required that an SBFEP forest development plan meet the requirements of the Act and regulations, the district manager decided that she also wanted to be satisfied that the plan would adequately manage and conserve forest resources. That is a similar test to section 41(1)(b) of the Act, which applies to non-SBFEP plans. The district manager derived the "adequate to manage and conserve" test from section 4 of the *Ministry of Forests Act*, which states that the purposes and functions of the ministry include managing, protecting and conserving the forest and range resources. The Code has since been changed to require that the "adequately manage and conserve" test be applied to plans under the SPFEP, consistent with a recommendation made by the Board in January 2000.

Based on the application of government policy on risk management (Joint Bulletin on Risk Management in the Application of Section 41(1)(b) of the *Forest Practices Code of British Columbia Act*), the district manager considered that marbled murrelet would be adequately managed and conserved if the plan did not cause serious or irreparable damage to the species.

To decide whether or not marbled murrelet would be seriously or irreparably damaged by forest development in the Brand operating area, the district manager sought guidance and information from the following sources:

a) Marbled murrelet studies

The district manager considered three reports: *Marbled Murrelet Nesting Habitat Assessment – Barkley Sound; Presence/Absence Survey of Marbled Murrelets – Barkley Sound; and Marbled Murrelet Habitat Assessment in the Effingham Draft Landscape Unit.*

Marbled Murrelet Nesting Habitat Assessment – Barkley Sound assessed six proposed development areas in the Barkley Sound area, including the Brand operating area. The study identified potentially suitable marbled murrelet habitat in the six development areas. *Presence/Absence Survey of Marbled Murrelets – Barkley Sound* detected marbled murrelets at 10 survey stations in the Barkley Sound area, including three stations within the Brand Creek watershed. *Marbled Murrelet Habitat Assessment in the Effingham Draft Landscape Unit* identified four areas of suitable marbled murrelet habitat in the draft Effingham landscape unit. The Brand Creek watershed was one of those areas.

In a summary of these studies, MWLAP indicated to the district manager that the Brand Creek watershed had exceptionally high marbled murrelet nesting activity levels and high habitat value.

b) Landscape unit planning

The *"Managing Identified Wildlife: Procedures and Measures – Volume 1"* guidebook recommends that wildlife habitat areas (WHA) for marbled murrelets be established during landscape unit planning. However, landscape unit planning had not been completed for the draft Effingham landscape unit.

It would have been difficult and complicated for the district manager to delay making a decision until landscape unit planning was complete because she had a contractual obligation to provide wood to the licensee under the timber sale licence.

c) Policy direction to establish WHAs for marbled murrelet in OGMAs

Ministry of Forests policy direction was to establish WHAs for marbled murrelet in OGMAs if possible. To minimize the impact on the timber harvesting landbase, government decided that OGMAs would first be selected from non-contributing and constrained areas of the landscape unit.

The district manager knew that 3,977 hectares of old growth was not contributing to the timber harvesting landbase in the draft landscape unit – twice as much as the minimum required to meet biodiversity requirements. The district manager expected that WHAs for marbled murrelet could be designated from the non-contributing landbase within the draft Effingham landscape unit and the Brand operating area.

However, not all old growth is suitable marbled murrelet habitat. Fragmentation of habitat, distance to edges, age and height of trees and elevation are all considerations when determining habitat suitability. The district manager's written rationale did not discuss the suitability of the old growth in the landscape unit for marbled murrelet habitat. However, marbled murrelet habitat suitability information was described in two of the three studies

mentioned above, and the district manager said she considered habitat suitability before making her decision.

d) Consultation with MWLAP staff

MWLAP staff wrote to the district manager and recommended that 14 of the 15 proposed cutblocks not be approved because of the potential impact on high quality marbled murrelet habitat. MWLAP suggested that the watershed would be an excellent candidate for a WHA.

MWLAP staff and the district manager knew that if the district manager rigidly applied government policy, all of the cutblocks in the Brand operating area could be approved for harvest. That was because the cutblocks were contributing to the timber harvesting landbase and policy required that any area needed for an OGMA or WHA would be first taken from the non-contributing landbase.

After meeting with MWLAP staff, the district manager determined that 4 of the 15 proposed cutblocks were in forest critical to marbled murrelet habitat, and that the remaining 11 blocks had a lower habitat value.

e) Overview flight

The district manager flew over the Brand operating area and the draft Effingham landscape unit on March 11, 1999.

Based on this information and guidance, the district manager wrote a detailed rationale explaining her decision.

The district manager decided that 4 of the 15 blocks, deemed critical marbled murrelet habitat, should be changed to category I status and thus would not be approved for harvest. The district manager did this despite policy direction that OGMAs, and thus WHAs, would first be selected from non-contributing and constrained areas of the landscape unit. The district manager stated that by designating the four cutblocks as category I, it would provide an opportunity to evaluate the potential for a WHA for marbled murrelet in the Brand Valley.

Ultimately, the district manager wrote in her rationale that she was satisfied that by approving the FDP, the marbled murrelet population of Barkley Sound would not be seriously or irreparably damaged.

Discussion

Loss of nesting habitat is thought to be a major contributor to the decline of marbled murrelet. In 1999, harvesting the approved cutblocks in the Brand Valley resulted in some loss and fragmentation of high quality marbled murrelet habitat in the Barkley Sound area. Loss of habitat for a red-listed species is a concern.

This loss happened for a number of reasons. Incomplete landscape unit planning made the district manager's decision to manage and conserve marbled murrelet at the forest development planning level difficult. Ideally, harvesting in the Brand operating area would have been deferred until the conservation of marbled murrelet could be addressed at a more appropriate

planning scale, such as within the Effingham landscape unit or Barkley Sound. In addition, timber was committed to the licensee under a timber sale licence long before it was known that the Brand operating area provided high quality marbled murrelet nesting habitat. In other words, the government was contractually obligated to provide the timber to the licensee.

When the Board evaluates a discretionary decision made by a statutory decision-maker (SDM), it considers whether the SDM exercised his or her discretion appropriately. In this particular case the Board assessed whether the approval of the FDP was based on the consideration of adequate and relevant information and sound reasoning, and whether it achieved the intent of the Code. In reviewing discretionary decisions, the Board does not assess whether a decision was the best or optimal choice.

The district manager's decision to approve the FDP took into account the existence of the timber sale licence, a number of reports and data on forest resource values, and an interpretation of section 41(1)(b) that was agreed to at the time by both MOF and MWLAP. The Code did not explicitly require the district manager to apply the section 41 "adequately manage and conserve" test to the SBFEP FDP. However, in light of the preamble to the Code, the district manager interpreted section 4 of the *Ministry of Forests Act* to require her to apply the test to the plan. Her interpretation of the legislation was consistent with the purposes of the Code.

Given these conditions, the Board considers the district manager's evaluation followed a rational course, and led to a logical conclusion. The Board considers that it was appropriate, given the specific situation of the Brand operating area FDP, for the district manager to be satisfied that it would adequately manage and conserve marbled murrelet habitat. However, the Board does not support the use of a lower standard of test to evaluate "adequately manage and conserve," as suggested by the ministries' joint bulletin. In the Board's opinion, "adequately manage and conserve" is not equivalent to avoiding "serious or irreparable damage" of forest resources, especially for a red-listed species.

Conclusions

1. The district manager complied with section 40 of the Act when she approved the 1999-2001 SBFEP FDP for the Brand operating area.

2. The district manager's evaluation of the information available to her followed a rational course, and led to a logical conclusion within the confines of the legislation requirements before her.

3. It is not appropriate to use a test of avoiding serious or irreparable harm as a test of adequately managing and conserving forest resources.

4. Incomplete landscape unit planning, insufficient inventories for all forest resources, and inadequate knowledge of the ecology and biology of the marbled murrelet made it difficult for the district manager to assess whether the marbled murrelet in Brand Valley would be adequately managed and conserved. Given the knowledge of the day, the majority of the Board conclude that it was appropriate for the district manager to be satisfied that the SBFEP FDP would adequately manage and conserve marbled murrelet habitat.

5. The harvest of the approved cutblocks in the Brand Valley in 1999 resulted in some loss and fragmentation of high quality marbled murrelet habitat in the Barkley Sound area. Loss of habitat for a red-listed species is a concern.

Minority Opinion

The minority opinion centres on disagreement with conclusions 2 and 4 stating that it was appropriate for the district manager to be satisfied that the SBFEP FDP would adequately manage and conserve marbled murrelet habitat at the time she made her decision. In the view of a minority of the Board, the facts of this case lead to the opposite conclusion: the determination was inappropriate.

MWLAP wildlife specialists advised the district manager that marbled murrelet is designated by the Committee on the Status of Endangered Wildlife in Canada as threatened. This means that marbled murrelet is likely to become endangered if factors affecting the species' vulnerability are not reversed. The main threat to this species is the loss of nesting habitat. MWLAP staff also informed the district manager that much of the high quality, low elevation marbled murrelet habitat in the landscape unit was already gone. The Brand Creek watershed was the best area of marbled murrelet nesting habitat remaining in the landscape unit. In her rationale the district manager acknowledged that "the harvesting of habitat currently used by the marbled murrelet will likely have a substantial negative effect on the marbled murrelet using that particular timber." She was aware of the exceptionally high populations of marbled murrelet nesting in the Brand and also aware of the vulnerability of marbled murrelet to forest habitat loss.

The district manager's conclusion regarding marbled murrelet in her rationale for the FDP determination was that "I am satisfied that by giving effect to the Brand FDP the mamu population of Barkley Sound will not be seriously or irreparably damaged." From there she states overall "I am satisfied that the FDP has been prepared to adequately manage and conserve the forest resources."

"Not being seriously or irreparably damaged" does not have the same meaning as "adequately managing and conserving." An FDP may pass the "not being seriously or irreparably damaged" test, but not meet the "adequately managing and conserving" test, since the latter is a test of higher standard regarding harm to and depletion of a species. In this particular case, with a threatened species, the distinction between these two tests is crucial since the marbled murrelet population has already demonstrated a consequential sensitivity to habitat loss. Removing nesting habitat, as approved in the FDP, further contributes to the factors affecting the species' decline.

A minority of the Board finds that the district manager did not apply to marbled murrelet the test of "adequately manage and conserve" that she set out to apply. Furthermore, the district manager had information and wildlife specialists' advice which indicated that harvesting the Brand would not adequately manage and conserve marbled murrelet. It was therefore not appropriate for the district manager to be satisfied that the SBFEP FDP would adequately manage and conserve marbled murrelet habitat.

Recommendations

1. Government should complete landscape unit plans as soon as possible. Landscape unit plans should provide clear and measurable objectives for the full range of forest resources and provide meaningful guidance to operational plans.

2. Government should accelerate progress on the establishment of wildlife habitat areas, particularly for red-listed species affected by changes to forest habitat.

In accordance with section 186 of the *Forest Practices Code of British Columbia Act*, the Board requests that the Ministry of Sustainable Resource Management and the Ministry of Forests report on the steps taken to implement these recommendations by May 1, 2002.